United States Court of Appeals

for the Second Circuit

REPLY BRIEF

No. 77-7237 77-7237

In The

UNITED STATES COURT OF APPEALS

For The Second Circuit

B

P/S

BRITISH AIRWAYS BOARD

and

COMPAGNIE NATIONALE AIR FRANCE,

Plaintiffs-Appellees,

vs.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. YANITELLI, MILTON A. GILBERT, JAMES C. KELLOGG, III, ALAN SAGNER, JOSEPH F. CULLMAN, III, JANE ENGELHARDT, LEWIS L. GLUCKSMAN, ROBERT F. WAGNER, Commissioners of The Port Authority of New York and New Jersey, and HOWARD SCHULMAN, Commissioner Designate of The Port Authority of New York and New Jersey,

Defendants-Appellants.

UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR AMICI CURIAE
FRIENDS OF THE EARTH, ET AL.,
IN SUPPORT OF DEFENDANTS-APPELLANTS

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REPLY BRIEF FOR AMICI CURIAE FRIENDS OF THE EARTH, ET AL., IN SUPPORT OF DEFENDANTS-APPELLANTS

Preliminary Statement

This reply brief is submitted on behalf of various environmental and neighborhood groups participating in this litigation as amici curiae.* It responds to the briefs filed

* These groups are Friends of the Earth, Inc., Metro Aircraft Noise Association, Inc., Howard Beach Association, Inc., The Hudson River Council, The Emergency Coalition to Stop the SST, The Environmental Defense Fund and various individuals.

by the United States (hereafter the "US Statement") and by the governments of the United Kingdom and France (hereafter the "UK-French Statement").

Because of the unequivocal confirmation by the United States that the federal government has not preempted the right of the Port Authority to adopt the March 1976 resolution challenged by the plaintiffs, we see no need to comment further on the preemption issue. Rather, in light of the US Statement, the judgment of the district court plainly must be reversed, unless it can be sustained upon grounds other than those passed upon by Judge Pollack. Hence, we respond to the alternative arguments advanced by the British and French governments and by the United States:

1. That the Bermuda and Paris Agreements compel the admission of the Concorde to JFK for a sixteen-month test period;

2. That the Port Authority should be enjoined from continued enforcement of its resolution because its conduct in excluding the Concorde has been discriminatory and unreasonable.

Point I

THE BILATERAL AGREEMENTS DO NOT GRANT LANDING RIGHTS TO THE CONCORDE NOR EVEN ADDRESS THE QUESTION OF TRIAL DEMONSTRATIONS FOR SUPERSONIC FLIGHT.

The British and French governments argue that the airlines have rights pursuant to articles 2 and 6 of the Bermuda and Paris Agreements but that the Port Authority has none under the provisions of article 5. Since these arguments merely restate the vested rights theory asserted by the airlines themselves, we treat them in summary fashion.

The reliance on articles 2 and 6

Like the airlines, the U.K. and France point to articles 2 and 6 for their conclusion that the effect of the Coleman Decision was to endow the airlines with immutable landing rights. The reliance on article 2(1) of the treaties is plainly misplaced, for the first subdivision makes clear that its provisions are concerned with the inauguration of services immediately following the execution of the treaty -- an event that took place roughly thirty years ago. Similarly, article 2(2) is merely a qualification of the preceding subsection and, therefore, has nothing to do with the present controversy in talking of satisfying the "aeronautical authorities" prior to the inauguration of services under the respective bilaterals.

Even assuming, however, that article 2 comes into play every time a new type of aircraft is sought to be put into commercial service, the French and British reliance on that section would still be mistaken. Secretary Coleman expressly recognized that, among the conditions that the airlines must satisfy to qualify under article 2, was procurement of the consent of the Port Authority to Concorde landings and take-offs at JFK. In other words, Secretary Coleman recognized that, among the "laws and regulations normally applied" within the United States, are those of local airport owners. Thus, he, as well as Ambassador Boyd, and President Carter himself, have repeatedly said that control over JFK lies with the Port Authority, whose consent must be obtained before the Concorde may operate at JFK.

With respect to article 6, the British and French argue that only "a contracting party" may "withhold or revoke" the exercise of rights specified in the annexes to the bilaterals. In effect, the argument is that article 6 is a remedies provision, that only the federal government may invoke the remedies provided and that, in fact, it has not done so here.

This argument, like the preceding one, misconstrues the thrust of the provisions relied upon. As we understand the bilaterals, the rights specified in their annexes are

simply the rights to fly particular routes -- as, for example, from London to New York. Indeed, even the UK-French Statement refers repeatedly to "route rights" in describing the substantive rights granted by the bilateral agreements. Those rights have nothing to do with the use of a particular type of aircraft. Again, however, even if we are mistaken, article 6 does not insure landing rights for Concorde at JFK, for it is clear that the Coleman Decision conditioned the airlines' rights to fly into and out of that airport upon the consent of the Port Authority. Thus, if article 6 is applicable at all, then there has been a decision by the federal aeronautical authority -- in the form of the Coleman Decision -- to withhold landing rights for the Concorde at JFK until the airport proprietor has consented.

The governing language of article 5

Our reliance on article 5 rests simply on the plain meaning of those provisions which apply the "laws and regulations" of one contracting party to the designated air carrier of the other contracting party. Our position is that "laws and regulations" includes local regulations -- such as that enacted by the Port Authority -- and that such local regulations "apply" to the aircraft of British Airways and Air France. In support of this conclusion, we have relied on the principle of treaty construction that sustains

local regulation; the line of cases holding that phrases substantially similar to "laws and regulations of one contracting party" include local law; and the language of article 5 itself which is not restricted to federal laws and regulations.

Considerations of policy compel the same conclusion. The bilateral agreements were framed at substantially the same time that Congress expressed its intent in the Civil Aeronautics Act of 1938 to permit local airport owners to regulate traffic into and out of their facilities.* It is unlikely that the executive branch of the Government intended to override this congressional policy by vague and intricate treaty language. Moreover, the interpretation for which the British and French contend would be inconsistent with the overall policy of the Bermuda and Paris Agreements -- as well as 150 other bilateral agreements -- to proscribe discrimination by one sovereign against the airlines of others. If the British and French were correct in their reading of the treaties, the net effect would be that American carriers would be subject to regulations at Heathrow and DeGaulle airports which are owned by the British and French national governments, but foreign carriers would not be subject to regulations of local airport owners in the United States, who

* See Brief of Port Authority Defendants-Appellants at I-59 n. 29.

are the proprietors of every commercial airport, with the exception of Dulles. Moreover, United States carriers would remain subject to the regulations of airport proprietors here, while foreign carriers flying into the United States would not be subject to such regulations. An intepretation of the treaties which leads to discrimination against American entities in favor of their foreign counterparts runs contrary to established canons of construction. See Todok v. Union State Bank, 281 U.S. 449, 454-55 (1930).

Finally, the State Department has consistently viewed the bilateral agreements as preserving rights of local airport proprietors. Although the US Statement concludes that "it would not be in its interests" for the federal government to address this issue in writing, there are ample on-the-record statements sustaining the Port Authority's position -- the testimony of Phillip R. Trimble of the State Department before the House Committee on Public Works and Transportation in December 1975 in the course of hearings on the very subject of Concorde* and the statements of Ambassador Boyd within the past six weeks explaining the views of the United States on the meaning of the existing bilaterals.** These executive department views are entitled to great weight in the Court's deliberations.

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* See Brief of Port Authority Defendants-Appellants at I-49 ff.

** Joint Appendix at III-56a-58a.

The UK-French Statement treats article 5 as though it were simply an adjunct to article 6 and enforceable only by "a contracting party." Thus, the British and French permit the airlines to assert rights as third-party beneficiaries under the second and sixth articles of the bilaterals but deny that the Port Authority may assert similar independent rights pursuant to article 5.* This interpretation assumes that a violation of article 5 -- that is, any breach of a state or federal law or regulation -- can only be remedied by the initiation of a proceeding to withhold or revoke route rights pursuant to article 6. In reality, airlines are subject to an entire spectrum of environmental, safety and commercial laws of federal or local origin by virtue of article 5. A proceeding pursuant to article 6 to withhold or revoke route rights would simply be a collateral effect -- but not the only effect -- of a violation of article 5.

The fallback argument of the British and French is to claim that the Port Authority ban is not a "law" or "regulation" within the meaning of article 5 because it is lacking "legislative character" -- not merely because

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* See UK-French Statement at p. 6.

it is local rather than federal in nature.* This characterization proceeds in utter disregard of the fact that the Port Authority's resolution of March 11, 1976 denied operating permission to "any supersonic aircraft" -- including the Concorde. Moreover, it fails to address an independent basis on which article 5 is invoked -- namely, that federal "law" includes in these circumstances a requirement of consent by the airport proprietor. Thus, regardless of the character of the Port Authority resolution, the governing federal law incorporates by reference a requirement of local consent.

The reference to the Port Authority ban as an "ad hoc" and "overtly discriminatory" order is merely a way for the British and French to open the door to issues that fall outside the parameters of this lawsuit -- namely, whether the Port Authority has acted in a discriminatory and unreasonable fashion. We address this subject next.

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* Reasserting a charge made in oral argument before this Court, the UK-French Statement asserts that the Port Authority had conceded its ban is not a "regulation." In truth, however, there was no such concession by the Port Authority. An examination of the relevant passages from the transcript of the hearing before Judge Pollack reveals that the Port Authority's counsel was trying to distinguish the "temporary ban" on Concorde from its long-standing regulation prohibiting any jet landings at JFK without Port Authority consent. (Joint Appendix at 266a-267a.) Moreover, any claim that the Port Authority conceded the issue flies in the face of the Port Authority's assertion on appeal that "laws and regulations" include localized noise restrictions. (Brief of Port Authority Defendants-Appellants at I-59-60.)

Point II

THE JUDGMENT OF THE DISTRICT COURT MAY NOT BE SUSTAINED UPON THE PREMISE THAT THE PORT AUTHORITY HAS DISCRIMINATED AGAINST THE PLAINTIFF AIRLINES, FOR NO CLAIM OF DISCRIMINATION WAS RAISED BY THE PLEADINGS OR LITIGATED BY THE PARTIES IN THE COURT BELOW. MOREVER, MANY ISSUES OF FACT WOULD PRECLUDE SUMMARY JUDGMENT IN PLAINTIFFS' FAVOR ON SUCH A THEORY.

The US Statement has ventured into new territory while refusing to address the questions which are squarely raised by the pleadings and the proofs. The federal government has suggested that the Port Authority's conduct from March 11, 1976, up to the present may have been "discriminatory . . . dilatory, arbitrary and unreasonable".* The tentative manner in which the Government asserts that the Port Authority "may have abused its proprietary power" and "may have unfairly and unreasonably withheld a decision" suggests that someone recognized the drawbacks of trying to sustain Judge Pollack on this ground: the absence of such a claim in the pleadings; the silence of the record on the issue; the absence of briefing by the parties; and the necessary intrusion of new factual issues. Borrowing a phrase that has been coined in this litigation, point "III" of the US Statement is an exercise in "politics on its finest level."**

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* US Statement at p. 5.

** Argument before the United States Court of Appeals for the Second Circuit on June 1, 1977 at 63.

An examination of the airlines' pleadings in this case, filed in March 1976 and never amended, reveals that four carefully articulated issues were raised by the airlines as grounds for overturning the Port Authority ban. Three of them -- the federal preemption question, the issue of treaty interpretation and the alleged interference with foreign relations -- formed the basis of a summary judgment motion which was held in limbo, by design, for more than a year. The fourth, the question whether the Port Authority's ban constitutes an unconstitutional interference with foreign and interstate commerce, was deliberately excluded from the motion for summary judgment so as to insure the presentation of a clean record, free from factual issues, for purposes of decision. Presumably, any claim of discrimination would have presented the named plaintiffs with similar strategic problems. What is clear, however, is that no claim of discrimination was ever made in the pleadings or in the motion for summary judgment. Indeed, we are at a loss to know the underpinning of the proposed discrimination claim -- whether statutory, common law or constitutional. Since the US Statement refrains from taking any position on the meaning or interpretation of the bilaterals, we can only assume that the source of the proposed cause of action does not lie in treaties.

Moreover, neither the airlines nor the Port Authority have created a record addressed to this issue which, necessarily, raises new factual issues. For instance, among the obvious questions suggested by the claim of discrimination are: why has the Port Authority failed to act since March 1976; what efforts, if any, has the Port Authority taken pursuant to its resolution to study and evaluate the noise problem in the context of Concorde;* has the Port Authority been dilatory in reaching a final decision or merely reacted in good faith to ever-changing proposals submitted by the airlines; how has the Port Authority enforced its existing noise restrictions since 1951; could the Concorde meet the existing noise restriction?** None of these issues have been addressed by the parties -- a point which the US Statement seemingly recognizes by stopping short of an outright conclusion that the Port Authority has discriminated.

The foolishness of the US Statement lies in its assumption that a finding of "unreasonableness" would

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* There has been public disclosure of the fact that the Port Authority has expended in excess of $250,000 on consulting contracts with recognized authorities aimed at answering the questions posed in its March 11, 1976 resolution.

** In the course of oral argument before this Court the Port Authority made clear that there was no concession that the Concorde could meet the present noise regulation at JFK: [FOOTNOTE CONTINUED ON NEXT PAGE]

"sustain the result below".* This conclusion rests on a line of authorities holding that an appellee may present all possible grounds for affirmance to the appellate court without the necessity of an independent appeal -- a principle that is simply inapposite. Cf. 1B Moore's Federal Practice ¶0.416[5] at 2303 (1974). None of the cases relied on by the Government involved the resolution on appeal of an issue which was not encompassed by the pleadings, argued

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

> "Judge Kaufman: And as a matter of fact in this particular case it is conceded that the Concorde can meet the Port Authority's existing noise rule, can't it?
>
> "Mr. Falvey: Not yet, your Honor. Our consultants are still studying that question.
>
> "Judge Kaufman: How about the existing noise rules?
>
> "Mr. Falvey: That is what they are studying, your Honor.
>
> "Judge Kaufman: They are restudying, but how about the existing noise rules?
>
> "Mr. Falvey: The consultants are studying the existing noise rules from two standpoints --
>
> "Judge Kaufman: Under the existing noise rules --
>
> "Mr. Falvey: one, whether they are suitable for application of the Concorde; and two, if so, can the Concorde actually meet the 112 standard.
>
> "Judge Kaufman: I thought it was conceded that the Concorde meets the present.
>
> "Mr. Falvey: By no means, your Honor." (26-27)

* US Statement at p. 20.

in the district court, addressed in the record or raised on appeal by the parties. Cf. United States v. American Railway Express Co., 265 U.S. 425, 435 (1923); Jamesbury Corp. v. Worcester Valve Co., 443 F.2d 205, 208 n. 3 (1st Cir. 1971); United States v. Campbell, 293 F.2d 816, 822 (9th Cir. 1961).

More relevant to this situation are cases following the general rule that a federal appellate court does not consider an issue not passed on below -- a modus operandi that is "'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues... .'" Singleton v. Wulff, 428 U.S. 106, 120 (1976), quoting with approval Hormel v. Helvering, 312 U.S. 552 (1941). This general rule has been scrupulously observed in the Second Circuit. See, e.g., Meetings & Expositions, Inc. v. Tandy Corp., 490 F.2d 714, 717 (2d Cir. 1974); Green v. Brown, 398 F.2d 1006, 1010 (2d Cir. 1968); U.S. v. Vitasafe Corp., 352 F.2d 62 (2d Cir. 1965); Schwartz v. S.S. Nassau, 345 F.2d 465, 466 (2d Cir.), cert. denied, 382 U.S. 919 (1965).

There is a related but narrower principle which governs this appeal, however: that a district court's grant of summary judgment may not be affirmed on another ground where the effect is to deprive the appellant of an opportunity to adduce a proper

record for decision. Fountain v. Filson, 336 U.S. 681, 683 (1949). This was the holding in Fruge's Heirs v. Blood Services, 506 F.2d 841, 844 (5th Cir. 1975) where the court held:

> "Where summary judgment is granted on one issue, an appellate court may not extend that judgment to another issue under the guise of affirming the 'result below' when the effect is to preclude the losing party from 'disput[ing] facts material to that claim.'"

This was also the basis for decision in Mariash v. Morrill, 496 F.2d 1138, 1145 (2d Cir. 1974) where Chief Judge Kaufman resisted a party's "unilateral and gratuitous assertion" of a claim to summary judgment that neither side had requested in the district court:

> "It is well settled, however, that the lack of a proper adversary foundation for consideration of this request requires that we not entertain it."

It follows, a fortiori, that a non-party's "unilateral and gratuitous assertion" on appeal of a new claim is entitled to short shrift.

Conclusion

For the reasons set forth in this reply brief, as well as the papers previously submitted by the Port Authority and its amici curiae, we respectfully request that the judgment of the court below be reversed on the ground that Judge Pollack erroneously decided the federal preemption issues. There are no alternative grounds on which to affirm that judgment.

Respectfully submitted,

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Dated: June 8, 1977
New York, New York

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Rose Giustra, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 98-40 64th Avenue, Rego Park, New York; that on the 8th day of June, 1977, deponent served the within Reply Brief for Amici Curiae Friends of the Earth, et al., In Support of Defendants-Appellants upon the following parties at the addresses designated by said parties for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York:

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Sworn to before me this 8th
day of June, 1977.

Charlotte M. Fischman
Notary Public

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Notary Public, State of New York
No. 31-9321450
Qualified in New York County
Commission Expires March 30, 1978